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No. 88-2089

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

Spring Term, 1989

JOHN G. BARROW, JR.

Plaintiff-Appellant-Petitioner

v.

N. G. LUND, et al.

Defendant-Appellee-Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO BRIEF IN OPPOSITION

JOHN MILLER
General Counsel
Department of Health and
Rehabilitative Services
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Tallahassee, FL 32399-0700
(904)488-2381
Attorney for Respondent

BEST AVAILABLE COPY

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JOHN G. BARROW, JR.,

Plaintiff,

vs. Case No. 87-1007-Civ-J-10

N. G. LUND, M.D., as an individual; DAVID PAGE, JR., as an individual,

Defendants.

REPORT AND RECOMMENDATION

I. STATUS

Plaintiff appears to allege that Rule 10D-6, et seq., Florida Administrative Code, is arbitrary, unreasonable, capricious, and ambiguous. The Defendants move to dismiss.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Although Plaintiff has alleged that under color of state law, as required by section 1983 civil rights action, it is

unclear from his Complaint if he intends to proceed under that federal statute. This lack of clarity arises from the rambling nature of his Complaint and from the fact that he has sued the Defendants in their individual capacity rather than their official capacity.

If he is suing under that statute, Plaintiff has wholly failed to allege any deprivation of life, liberty, or property by someone acting under color of law without due process as guaranteed by the Fourteenth Amendment. Economic Development Corp. of Dade County v. Stierheim, 782 F.2d 952 (11th Cir. 1986).

Rule 8, Federal Rules of Civil Procedure, require that a complaint be a short and plain statement of a plaintiff's claim. Plaintiff has utterly failed to achieve this standard.

III. RECOMMENDATION

The Complaint be DISMISSED without prejudice.

DONE AND ENTERED at Jacksonville, Florida, this 26th day of January, 1988.

/s/
HARVEY E. SCHLESINGER
United States Magistrate

Copies to:

Hon. Wm. Terrell Hodges

Mr. John G. Barrow, Jr.
Route 1, Box 470
Callahan, FL 32011

John Miller, Esquire
General Counsel
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

JOHN G. BARROW, JR.,

Plaintiff,

v. Case No. 87-1007-Civ-J-12

N. G. LUND, M.D., as an individual; DAVID PAGE, JR., as an individual,

Defendants.

MOTION TO DISMISS

Defendants, N.G. Lund, M.D. and David Page, Jr., ("Defendants"), as agents and employees of the Department of Health and Rehabilitative Services, State of Florida ("DHRS"), files this motion to dismiss, and say:

1. This is a motion to dismiss the Original Complaint With Demand For Jury Trial By Three Judges District Court ("Complaint"), pursuant to the provisions of Rule 12(b), Rules of Civil Procedure, and/or for a motion for more definite

statement pursuant to Rule 12(e), R.Civ.P.

2. The Complaint fails to state a cause of action which this Court may grant relief and this Court does not have jurisdiction over the subject matter.

3. The Complaint is vague and unclear, and the Defendants cannot frame a proper responsive pleading. It is impossible to follow a clear line of reasoning when reading the Complaint. Defendants' understanding of the Complaint is that the Plaintiff has alleged that Rule 10D-6, Florida Administrative Code, is either an unlawful delegation of legislative authority, and/or that the Defendants' use of Rule 10D-6, F.A.C., has caused damage to the Plaintiff; and that Rule 10D-6 is ambiguous, unreasonable, capricious and arbitrary and he has been damaged by said rule.

4. If the above is a correct interpretation of the Complaint then Defendants will not pursue a motion for a more definite statement, however, Defendants are not certain the above constitutes the gravamen of the Complaint.

Wherefore, the Complaint should be dismissed as stated above and/or the Plaintiff be required to file an Amended Complaint to comply with Rule 8, R.Civ.P.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

1. The allegations alleged, inter alia, that Rule 10D-6, F.A.C., et. seq., has damaged Plaintiff, and this appears to be the only law which Plaintiff contends is applicable to this cause. Plaintiff has alleged that due to portions of said rule being arbitrary, unreasonable, capricious, and ambiguous, that he has suffered damages.

Rule 10D-6, F.A.C., is entitled, Standards For Onsite Waste Disposal Systems, and regulates septic tank permits. Said regulations are performed for the State of Florida by DHRS, where the named Defendants are employed. The Defendants are alleged to have either enacted some final action against the Plaintiff pursuant to Rule 10D-6, et. seq., and the Plaintiff has challenged the validity of said rules.

The State of Florida has provided a comprehensive remedial scheme under the provisions of Chapter 120, Florida Statutes, to guarantee anyone who wishes to challenge any final agency action a hearing under Section 120.57, F.S.; or to grant anyone who wishes to file a challenge to any rule or policy a hearing under Section 120.56. State administrative remedies must be exhausted

before bringing of civil rights action if those remedies are speedy. Black v. Beame, 419 F.Supp. 599 (NY, 1976), affirmed 550 F.2d 815.

Section 1343 of Title 28 does not provide district courts with jurisdiction over state defendants where plaintiff has not exhausted their administrative remedies or showed that such exhaustion would be futile. Cave v. Beame, 433 F.Supp. 172 (NY, 1977). In this case Plaintiff has neither alleged he has pursued his administrative remedy nor stated that it would be futile to do so. Therefore, this Court does not have jurisdiction over the subject matter of the Complaint.

Plaintiff has not alleged a violation of his civil rights, nor has he raised a federal question that gives this Court jurisdictio over the subject matter.

Section 1343 of Title 28 was not intended to vindicate ordinary state torts and thus, in order to satisfy jurisdictional requisites of the statute, sufficient facts must be alleged not only to establish that challenged acts were "under color of state law," but also taht the alleged deprivation was a right, privilege or immunity secured by the constitution or laws of the United States. Woods v. Lake Drive Nursing Home, Inc., 503 F.Supp. 183 (Md. 1980).

Plaintiff has only alleged that the damages he has suffered occurred under color of state law (Rule 10D-6, F.A.C.), and has not alleged any deprivation under any federal statutory or constitutional law. To invoke the federal district court's subject-matter jurisdiction, plaintiff must allege he has been deprived of life, liberty, or property by

someone acting under color of law without due process of law as guaranteed under the 14th Amendment. Economic Development Corp. of Dade County v. Stierheim, 782 F.2d 952 (11th CA 1986).

Inasmuch as Plaintiff has not alleged a federal question, this Court is without jurisdiction over the subject matter of the Complaint, and this matter should be dismissed.

2. Defendants believe they have disected the Complaint and have addressed the issues contained therein in the above motion to dismiss. However, in the event they have been unable to uncover some issue, it is because the Complaint is vague and unclear. Rule 8, R.Civ.P., simply requires that the complaint be a short and plain statement of plaintiff's claim. The purpose of this rule is to give defendants a fair notice of

plaintiff's claim and the grounds on which it rests. Weiner v. Bank of King of Prussia, 358 F.Supp. 684 (Pa. 1973).

Complaints which ramble, which needlessly speculate, accuse, and condemn, and which contain circuitous diatribes far removed from the heart of the claim do not comport with goals of Rule 8 prescribing short and plain statement of grounds for jurisdiction and claim for relief, and should be required to replead to comport to Rule 8, or dismissal. Prezzi v. Berzak, 57 F.R.D. 149 (NY 1972).

Wherefore, Defendants request that this Court dismiss the Complaint for failure to allege facts which would give this Court jurisdiction over the subject matter, or in the alternative, to grant their motion for a more definite statement.

/s/
JOHN MILLER
General Counsel
Department of Health and
Rehabilitative Services
1323 Winewood Blvd.
Tallahassee, FL 32399-0700
(904)488-2381

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 3rd day of December, 1987, to: JOHN G. BARROW, JR., Route 1, Box 470, Callahan, Florida 32011.

/s/
JOHN MILLER

SECTION 120.56(1), FLORIDA STATUTES

120.56 Administrative determination of rule by hearing officer -

(1) Any person substantially affected by a rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appendix to Brief in Opposition was served by U.S. Mail this 19 day of July, 1989, in accordance with rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States Post Office or mailbox, with first-class postage prepaid addressed to:

John G. Barrow, Jr.
Rt. 1, Box 470
Callahan, FL 32011

JOHN MILLER